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No. 01-1859

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

RONALD P. WHITE,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

REPLY TO BRIEF IN OPPOSITION

JARED S. NEWMAN, P.A.
NEWMAN & MCDOUGALL
P.O. Box 1336
915 Port Republic Street
Beaufort, SC 29901-1336
(843) 379-7000

KENNETH W. STARR
Counsel of Record
DARYL JOSEFFER
RYAN P. PHAIR
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioner

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15 pp

TABLE OF CONTENTS

Page

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS. 2

II. THE STATUTE CANNOT SURVIVE ANY LEVEL OF FIRST AMENDMENT SCRUTINY 7

III. THIS CASE IS MANIFESTLY APPROPRIATE FOR CERTIORARI. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Bery v. City of New York,
97 F.3d 689 (2d Cir. 1996) 2, 3

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 5

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995) 3

Jamison v. Texas,
318 U.S. 413 (1943) 5

Lovell v. City of Griffin,
303 U.S. 444 (1938) 6

Martin v. City of Struthers,
319 U.S. 141 (1943) 5

Miller v. California,
413 U.S. 15 (1973) 4

Republican Party of Minnesota v. White,
122 S. Ct. 2528 (2002) 9

Schad v. Mount Ephraim,
452 U.S. 61 (1981) 5

Stutson v. United States,
516 U.S. 193 (1996) 10

Texas v. Johnson,
491 U.S. 397 (1989) 3

Turner Broad. Sys., Inc. v.
Federal Communications Comm'n,
512 U.S. 622 (1994) 2

United States v. Playboy Entm't Group, Inc.,
529 U.S. 803 (2000) 7

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 9

Other Authorities

FDA Advisory Opinion,
Docket No. 81A-0315/AP (July 21, 1986) 8

Leo Frobenius, *The Children of Promise*
(New York: J.B. Lippincott, 1909) 1

Petula Dvorak, *Far More than Skin Deep:*
Firefighters Line Up for Tattoo Tributes to 9/11,
Washington Post, Aug. 24, 2002 5

Robert S. Greenberger, *Tattoo Taboo: In South Carolina,*
You Can't Get One,
Wall St. J., July 22, 2002 9

Stephen Breyer, *Breaking the Vicious Circle: Toward*
Effective Risk Regulation
(Harvard 1999) 8

The Federalist No. 78
(Alexander Hamilton) (Bantam 1982) 10

In an extraordinary submission, South Carolina unapologetically defends its assault on our system of free expression by pretending that the First Amendment problem can be defined away. All that is at stake, the Court is repeatedly told, is dye inserted under the skin. Under this deconstructionist exercise, South Carolina could likewise make sport of, say, Jackson Pollock's artistry. Perhaps Leo Frobenius's *The Children of Promise*,[1] with its displays of tattoo portraits, will be next on the censorship block.

Standing as a sharp rebuke to respondent's denial of historical and cultural reality, the ancient art of tattooing is on display in museums throughout the world. It continues, uninterrupted, across time and culture to capture the human imagination. Its popularity has been powerfully manifested of late in the actions of New York firefighters and others who have communicated, through tattoos, their solidarity and sorrow over the events of last September 11. Yet the South Carolina Supreme Court, over vigorous dissent, held that a complete ban on this established art form is entitled to *no* First Amendment protection. In a constitutional order that has long protected pornography, this decision is utterly at war with precedents of this and other courts.

As if more were needed, South Carolina takes aim at our system of federalism by now telling one of its citizens to leave hearth and home and journey across state lines in order to resume his artistry – artistry that is perfectly lawful and appropriately regulated for health reasons in forty-eight States. All petitioner needs to do, the Court is told, is to move to North Carolina. This novel approach to the right to

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[1] Leo Frobenius, *The Children of Promise* (New York: J.B. Lippincott, 1909). The book includes an 1826 self-portrait by a New Zealand chieftain, Te Pehi Kupe, featuring Kupe's lavish facial tattooing. A modern-day Kupe who found himself in Charleston or Greenville would be invited to leave the State if he wanted to enhance his display of New Zealand artistry.

travel, an invitation to depart enforced in dead earnest by the criminal law, is patently offensive to both First Amendment and federalism values. In a free society, this latter-day atavism should not stand. But it will unless this Court acts.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

Under the South Carolina Supreme Court's decision, *no* First Amendment scrutiny applies to the art of tattooing because (i) the "process" of tattooing is conduct rather than speech, and (ii) tattooing lacks a "particularized message" that would likely be understood by others. Pet. App. 3a, 5a-6a. Respondent mounts no credible argument that either holding is consistent with First Amendment principles.

a. As to the first of these holdings, respondent cannot refute the obvious point that its attempted distinction between "the process" of tattooing and the resulting tattoos is wholly illusory. If respondent's argument were accepted, a State could prohibit *the act of putting a pen to paper* or *the act of smearing paint around with horse hair* to justify a ban on books or paintings. A canyon-sized loophole would be opened. The book could be killed before it was written, the painting before it was painted. Thus, the Second Circuit has held, in conflict with the court below, that "conduct" that is part of the creation or dissemination of art falls within the ambit of the First Amendment. *See Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

Respondent attempts to distinguish the Second Circuit's decision in *Bery* by arguing that the "conduct" in *Bery* (the sale of artwork in public places) did not present "health concerns." Opp. 5. But the presence of health concerns hardly forestalls any and all First Amendment scrutiny. Instead, it is one of several factors to be considered *as part of* a court's First Amendment scrutiny. *See, e.g., Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 662 (1994); *Hill v. Colorado*, 530 U.S. 703 (2000);

Amicus Curaie Br. of Center for Individual Freedom 5-6. If the presence of health concerns rendered the First Amendment wholly inapplicable to the "conduct" of creating speech, States could ban a wide range of activity – including typing (which can cause carpel tunnel syndrome) and sculpting (in which stone or metal might fall on an artist or observer) – *without regard* to its communicative or artistic content, or the availability of less drastic remedial measures.

b. While respondent at least struggles to defend the South Carolina Supreme Court's "conduct" analysis, it jettisons the court's other holding. Under that holding, artistic expression merits First Amendment protection only if it satisfies the *Spence* test, which asks "whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.'" Pet. App. 5a (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). Application of this test in this case is directly contrary to *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Bery*, both of which hold that artistic expression need not satisfy *Spence* to warrant protection. *See* Pet. 12-13.[2] Instead, this Court has repeatedly protected art as art. *See id.* at 8-10, 12 .

Significantly, respondent eschews any effort to defend the South Carolina Supreme Court's requirement of a "particularized" message that will likely be understood by others. *See, e.g.*, Opp. 10 (conceding that a "'particularized'

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[2] Respondent erroneously claims that *Bery* cited *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980), "for the proposition that tattooing is conduct which falls outside of the First Amendment's protection." Opp. 5. In reality, *Bery* cited *Yurkew* for the proposition that "[c]ourts have struggled with such issues in the past," 97 F.3d at 696, an acknowledgement that serves only to underscore the need for clear guidance from this Court on these important issues. *See* Pet. 14-16.

message is not a condition of constitutional protection"). Instead, it advances a series of other arguments: that "[m]erely labeling conduct as 'artistic expression' does not entitle it to First Amendment protection," *id.* at 12; that an art form must be "an *important* or *significant* method of communicating ideas" to warrant protection, *id.* at 13 (emphasis in original); and that "*some* intent to convey a message, even if not a narrow or particularized one, is required before First Amendment protection attaches," *id.* at 10 (emphasis in original).

The first of these points is uncontroversial – "cockfighting" and "bearbaiting" (Opp. 9) are not art, regardless of whether one attempted to label them as such. But respondent's other attempts to limit the types of art entitled to First Amendment protection, and especially its focus on the supposed "importan[ce] or significan[ce]" of an art form, fly in the face of this Court's precedents protecting art as art. Pornography hardly has greater social importance than tattooing, but it has long been accorded at least some level of protection insofar as it is not obscene. *See, e.g., Miller v. California*, 413 U.S. 15 (1973). The obscenity inquiry, in turn, depends in part on whether pornography lacks "serious ... *artistic* ... value." *Id.* at 24 (emphasis added). Thus, the relevant question is whether tattooing is artistic expression, not whether it is deemed "important."

c. There can be no serious question that tattooing is an established form of artistic expression. Neither court below disagreed with that conclusion. As explained in the petition, and elaborated in detail by *amicus curiae* Dr. Enid Schildkrout, the chair and curator of the Division of Anthropology of the American Museum of Natural History, tattooing is an elaborate, 8,000 year old art form. *See* Pet. 3-4; Schildkrout Br. 4-5, 1a-3a. Tattoo art is on display in art and cultural museums around the world, and has been the subject of many scholarly symposia. *See* Schildkrout Br. 15-16, 10a-13a. Tattooing is done in numerous and ever-

evolving styles, designs, and colors. *See id.* at 5-14. It is, quite simply, art in the same sense that every other form of drawing or painting is art.

Moreover, tattoos are highly communicative. Crusaders who visited Jerusalem in the Middle Ages often received tattoos of religious emblems to communicate their accomplishments. *See id.* at 4. Before people had proper names in Europe, tattoos were an important way of identifying one another. *See id.* at 5. Most recently, there has been a tremendous surge in patriotic tattoos in the aftermath of last September 11. As the Washington Post recently reported, firefighters in particular have received tattoos to communicate solidarity with fallen firefighters and remember their losses. *See* Petula Dvorak, *Far More than Skin Deep: Firefighters Line Up for Tattoo Tributes to 9/11*, Washington Post, Aug. 24, 2002, at C1; Schildkrout Br. 14.

d. Respondent attempts to denigrade this 8,000-year-old artistic tradition by suggesting that tattoo artists could draw or paint on canvas instead, or could draw on bodies with paint or henna. *See* Opp. 9. Of course, this does nothing to support the South Carolina Supreme Court's contention that the First Amendment is *inapplicable*. The availability of alternatives is relevant to the application of First Amendment scrutiny, not to the determination whether any such scrutiny applies. *See, e.g., Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080 (2002). Moreover, when governments attempt to impose complete bans on entire mediums of expression, this Court has vigilantly protected individual methods of expression, regardless of the availability of even close substitutes. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 55-56 (1994) (residential sign ban); *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) (live entertainment); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (handbills); *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943) (door-to-door distribution of

literature); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (pamphlets).

Equally important, tattooing is inherently unique because it is a permanent symbol on a person's body. Other forms of body art, such as body painting, are not adequate substitutes because, as respondent recognizes, they are temporary. *See* Opp. 9. Just as drawing with chalk on a blackboard is no substitute for oil painting on canvas, so too painting on a body is no substitute for tattooing. Indeed, it is the very permanence of tattooing that renders it a unique form of art and a powerful form of communication. A permanent tattoo of a September 11 remembrance or the name of a loved one can be far more powerful than a drawing that soon washes off or fades away.[3]

Nonetheless, respondent repeatedly suggests that petitioner could exercise his First Amendment rights in neighboring States, such as North Carolina. *See, e.g.*, Opp. 18. That hardly matters. A ban on abortion would not be constitutional merely because abortions could be received in other States. First Amendment freedoms are no different. *See, e,g., Hill v. Colorado*, 530 U.S. 703, 781-82 (2000).

e. The bottom line is this: in a society that protects pornography, it should be self-evident that a ban on an entire art form cannot stand. That the South Carolina Supreme Court held the First Amendment wholly inapplicable to such a ban reflects, in part, uncertainties in this Court's artistic expression jurisprudence. This Court has held that the *Spence* test does not apply to artistic expression, but it has never identified the test that does apply. *See* Pet. 15. This

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[3] Respondent is wrong to claim that petitioner "conceded that he could use other mediums, such as oil and acrylic paint on canvas, to create pictures." Opp. 2. Petitioner testified that although his parents encouraged him to be a painter, painting never made him "feel like [he] was an artist." Record Tr. at 35. Petitioner never conceded that painting on canvas and tattooing are interchangeable, as respondent implies.

lacuna in the Court's jurisprudence contributed to the South Carolina Supreme Court's reliance on its untenable distinction between the process of creating art and art itself. It has also led respondent to borrow a series of unhelpful tests from other aspects of this Court's jurisprudence, such as expressive conduct cases that address indirect and incidental burdens on expression (but not direct bans on an entire form of artistic expression). *See, e.g.*, Opp. 9. This Court could usefully clarify this important area of law.

II. THE STATUTE CANNOT SURVIVE ANY LEVEL OF FIRST AMENDMENT SCRUTINY

In addition to abandoning the South Carolina Supreme Court's reliance on the *Spence* test, respondent relies on another rationale the court below eschewed: that the statute could survive intermediate First Amendment scrutiny because it is "narrowly tailored to serve the State's significant interest in protecting the health and safety of its citizens." Opp. 17. Respondent has not even begun to show that its complete ban is "narrowly tailored." In the state courts, respondent introduced *no* evidence on the health effects of tattooing. In contrast, petitioner testified that tattooing can be performed safely. *See* Record Tr. at 18-19. He also called John Black, a former director of the board of the Alliance of Professional Tattooists, who offered testimony on the effectiveness of federal regulations in furthering the States' interest in safety while affording proper respect for First Amendment rights. *See id.* at 50-60.

Instead of attempting to carry its evidentiary burden on this point, respondent attempts to shift the burden to petitioner. *See, e.g.*, Opp. 1, 16 n.11, 18-19. This turns the First Amendment inquiry upside down. It is well settled that "[w]hen the government restricts speech, *the government* bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) (collecting cases) (emphasis added).

The absence of record evidence supporting the ban is fatal to *respondent's* case, not petitioner's.[4]

The want of narrow tailoring is underscored by the impressive body of experience from other States. Marching down memory lane, respondent trumpets a series of old cases holding that various tattoo bans were constitutional. *See* Opp. 6-7. There is, however, a fundamental flaw in this litany of cases – every one of those bans was enacted at a time when health risks associated with tattooing were poorly understood and there was reason to believe the risks were substantial. *See* Pet. 4. Since then, the medical profession, tattoo artists, and federal and state regulators have developed precautions that are so effective that *all* of the bans at issue in those cases have been repealed. *See id.* at 4-5. Since then, there has been no health epidemic from tattooing in any of the 48 States that regulate but do not ban tattooing. Thus, the courts that have considered tattoo bans in recent years have invalidated them. *See id.* at 14. There is no basis in the record or real-world experience for respondent's assertion that its complete ban on tattooing is "narrowly tailored" to meet or respond to health concerns.[5]

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[4] Respondent attempts to make up for this deficiency by citing a selection of random statements from various Food and Drug Administration ("FDA") pamphlets for the proposition that there is some risk associated with tattooing. *See* Opp. 14-15. But respondent neglects to mention that the FDA has expressly declined to regulate that risk precisely because existing regulations are sufficient to protect the public health. *See FDA Advisory Opinion*, Docket No. 81A-0315/AP (July 21, 1986); *see also* Pet. 4-5; Br. of *Amici Curiae* Alliance of Professional Tattooists, Inc. & National Tattoo Ass'n, Inc. ("Tattooists' Br."), App. A.

[5] Even if First Amendment freedoms were not at stake, South Carolina's insistence on completely banning a practice merely because there are some risks associated with it would be untenable. *See* Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 11-20 (Harvard 1999) (cautioning against overzealous regulatory efforts to reduce risk to zero).

Finally, it should not pass unnoticed that respondent's vaunted concern with the health effects of tattooing does not appear to be the actual reason South Carolina continues to ban the art form. As the Wall Street Journal recently reported, the main legislative proponent of South Carolina's tattoo ban, Senator Jake Knotts, has always justified the ban on religious, not health, grounds. *See* Robert S. Greenberger, *Tattoo Taboo: In South Carolina, You Can't Get One,* Wall St. J., July 22, 2002, at A1 (quoting Sen. Knotts as stating that "[i]f God wanted you to have a tattoo, he'd have put your name on you"); Tattoists' Br. 5-6 n.3 (providing additional citations). That will not do in a free society.

III. THIS CASE IS MANIFESTLY APPROPRIATE FOR CERTIORARI.

The much-discussed decision below is too profoundly anti-liberty to stand uncorrected. An entire art form has been banned throughout an entire State on the ground that the First Amendment is wholly inapplicable to the "conduct" of creating art. In its assiduous attention to protecting the foundational principles of free expression, this Court has frequently granted *certiorari* in First Amendment cases in the absence of a circuit split. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). Just last Term, this Court granted *certiorari* in two First Amendment cases in such circumstances. *See Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002); *Watchtower*, 122 S. Ct. 2080. More specifically, this Court has exhibited a special willingness to review *complete bans* on entire mediums of expression, regardless of the absence of a circuit split. *See, e.g., Watchtower,* 122 S. Ct. at 2086.

The need for review is especially keen inasmuch as petitioner has been *criminally convicted* for performing his artistry. South Carolina sentenced petitioner to a year in prison (suspended to five years of probation) and a $2,500

fine (suspended to $500). In allocating limited judicial resources, this Court has evinced a special concern with protecting the rights of criminal defendants. *See, e.g., Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam). This is not the time to stop.

* * * *

Before closing, we are constrained to point to a troubling structural anomaly that renders review by this Court even more urgent. The court below required petitioner to make a "clear showing" that "the act is invalid, leaving no room for reasonable doubt that it violates some provision of the Constitution." Pet. App. 4a (internal quotation omitted). That requirement finds no support in this Court's precedents. Constitutional rights should be *protected*, not subjected to *heightened* burdens not imposed on more routine defenses.

This unfairness is magnified by the fact that the justices of the South Carolina Supreme Court are appointed to *limited terms* by the legislature. As Alexander Hamilton explained, this system of selecting justices is "fatal" to judicial independence. *The Federalist No. 78,* at 398 (Alexander Hamilton) (Bantam 1982). That justices appointed in this manner have erected a strong presumption in favor of the constitutionality of state statutes leads inexorably to an appearance of partiality. When judges appointed in this manner uphold a criminal conviction on the ground that an entire art form falls wholly outside the First Amendment, this Court's intervention is all the more needed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JARED S. NEWMAN, *P.A.*
NEWMAN & MCDOUGALL
P.O. Box 1336
915 Port Republic Street
Beaufort, SC 29901-1336
(843) 379-7000

KENNETH W. STARR
Counsel of Record
DARYL JOSEFFER
RYAN P. PHAIR
KIRKLAND & ELLIS
655 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 879-5000

Counsel for Petitioner